UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

SHAMROCK FOODS, INC.,
Employer,
and Case No. 27-RD-260796

CURTIS THOMASON,
Petitioner,
and

TEAMSTERS LOCAL 483,
Union.

PETITIONER'S REQUEST FOR REVIEW

INTRODUCTION

Pursuant to National Labor Relations Board ("NLRB") Rules & Regulations 102.67, Petitioner Curtis Thomason files this Request for Review of the Regional Director's July 28, 2020 dismissal of his decertification petition ("Petition"). The Regional Director dismissed Mr. Thomason's Petition to decertify Teamsters Local 483 ("Teamsters") for the sole reason that a "successor employer" had recently taken over his workplace. Citing the Board's divided decision in *UGL-UNICCO Service Co*., 357 NLRB 801 (2011), the Regional Director held that Mr. Thomason and his co-workers were stripped of their Section 7 and 9 rights for what she called "a reasonable time," due to the fortuity of their former employer being purchased by another company.

This Request for Review seeks to overturn the "successor bar" doctrine of *UGL-UNICCO*, which a Board majority resurrected in 2011 as part of its effort to entrench

incumbent unions and prevent employees from exercising their National Labor Relations Act ("NLRA") Sections 7 and 9 rights to reject an unwanted union, in service of "the ideological goal of insulating union representation from challenge whenever possible." *Id.* at 810 (Member Hayes, dissenting); *see also Americold Logistics, LLC*, 362 NLRB No. 58, at *11 (Mar. 31, 2015) (Member Miscimarra, dissenting) (stating the Board is treating its "'bar' doctrines as [an] essential means to protect unions from decertification or displacement by a rival union"). Prior Boards have pursued this ideological goal with vigor in a host of related cases, all designed to limit employee free choice and prevent unions' decertification even when they have clearly lost majority support. *See, e.g.*, *Lamons Gasket*, 357 NLRB 739 (2011); *Americold Logistics*.

The common thread in these cases is that the Board majority pays lip service to the NLRA's core purpose of employee free choice, *see Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring), while elevating a union's power and the perks of incumbency to the pinnacle of the NLRA's policies. This is often done in the name of "industrial stability" for the union or employer, yet it renders employee free choice a mere afterthought. In cases like this, the "successor bar" halts employees' ability to decertify an unwanted union solely because their employer's identity has changed through the happenstance of a sale, buyout, reorganization, or successor transaction. Under the successor bar, the incumbent union is entrenched and the employees' desires disregarded.

The successor bar undermines the NLRA's core purpose of employee free choice

by failing to account for the employees' actual desires and past experiences with their union representative. It also fails to recognize the Board's highest calling: to conduct elections and ensure employee free choice whenever there is a question concerning representation. The successor bar's paternalistic notion that employees suffer "anxiety" in all corporate reorganizations, *UGL-UNICCO*, 357 NLRB at 804, and are therefore incapable of deciding for themselves whether the incumbent union is worth keeping, is fatuous.

Under NLRB Rules & Regulations 102.67(d)(1)–(4), there exists compelling reasons for the Board to grant review and reverse the successor bar, which arbitrarily saddles Curtis Thomason and his fellow employees in Idaho with an unwanted incumbent union simply because the employer name on their paychecks has changed from U.S. Foods to Shamrock Foods (hereafter "Shamrock"). *UGL-UNICCO* and the successor bar have proven to be detriments to employee free choice and should be overruled so that Mr. Thomason and his fellow employees can regain the ability to choose or reject their exclusive representative. Overruling *UGL-UNICCO* and the successor bar will uphold the NLRA's "bedrock principles of employee free choice and majority rule." *Gourmet Foods, Inc.*, 270 NLRB 578, 588 (1984) (Member Stephens, concurring). Finally, this is a case of nationwide importance because this fact pattern constantly recurs as companies merge, consolidate, win and lose bids for work, and purchase each other. For all of these reasons, this case especially is worthy of Board review.

STATEMENT OF FACTS

Mr. Thomason believes that the Regional Director's July 28, 2020 Decision and Order ("D&O") sets forth an accurate timeline of when the Employer took over operations

in Idaho and the general history of bargaining. Thus, he does not quarrel with the essential facts and timelines outlined. Mr. Thomason also adopts by reference the detailed Statement of Facts contained in the Employer's Request for Review, filed on July 28, 2020.

Indeed, it would be hard for Mr. Thomason to contest the essential facts about the parties' bargaining history because employees like him are not privy to the collective bargaining negotiations and schedules of their employer and the union, and are rarely consulted about these things. Employees are usually kept in the dark about the beginning of bargaining, the timing of bargaining, or the progress of any negotiations.

This lack of knowledge highlights one of the major flaws of the "successor bar" concocted by the Board majority in *UGL-UNICCO*: how is an employee supposed to know whether he or she is subject to a six month bar, a twelve month bar, or some "reasonable" period in between based upon ephemeral "multifactors" that seem like moving targets? *Id.*, 357 NLRB at 809 ("We will apply the multifactor analysis of *Lee Lumber* to make the ultimate determination of whether the period had elapsed."); *MGM Grand Hotel, Inc.*, 329 NLRB 464, 469 (1999) (Member Brame, dissenting) (decrying the way the amorphous, multifactor "reasonable time to bargain" standard makes it impossible for employees to exercise their free choice); *Student Transp. of Am.*, Case No. 06-RD-127208 (Decision and Direction of Election, June 5, 2014) (employees trying to decertify in a successor situation filed *four* different RD petitions over a period of several months until the Region finally granted an election under the "multifactor" test, which the union lost by an overwhelming 88-13 vote).

Despite accepting the Region's and Shamrock's view of the facts, Mr. Thomason

wishes to highlight two particularly important facts that undermine completely the rationale of *UGL-UNNICO*: 1) the Teamsters and Shamrock are nowhere near reaching an agreement, having not even begun to discuss economics—the meat and bones of any collective bargaining agreement (TR136:2-9); and 2) once the Teamsters got wind of this decertification petition, it began hastily accepting bargaining proposals it had previously rebuffed (TR152:10-19; 158:16-18; Employer Exs. 7 & 8). The Teamsters offered no explanation for this sudden reversal of position, thus highlighting the ways that unions try to "game the system" and use the Board's processes to protect themselves at the expense of employees' interests. (See TR 156:10-157:13, Teamster's official Michael Beranbaum admitting that the decertification petition was a factor in the Union's sudden change of position on the previously rebuffed bargaining proposals).

On July 28, 2020, the Regional Director dismissed Mr. Thomason's Petition based on the successor bar doctrine adopted by a divided Board in *UGL-UNICCO Service Co.* (A copy of the D&O is attached). This Request for Review follows.

ARGUMENT IN SUPPORT OF REVIEW

Factually, this case is simple: a bargaining unit of food distribution workers in Idaho no longer wishes to be represented by the Teamsters. Mr. Thomason and his co-workers submitted a decertification Petition to NLRB Region 27 to vindicate their NLRA Sections 7 and 9 rights. 29 U.S.C. §§ 157 and 159(a). Indeed, Mr. Thomason believes he collected signatures from a majority of employees in the unit for his showing of interest against continued union representation. However, the so-called "successor bar," a doctrine created by a divided Board to entrench incumbent unions at all costs, has thwarted these employees

from exercising their right to choose or reject a bargaining representative—all because the predecessor employer, U.S. Foods, sold the facility to Shamrock Foods. (*See* D&O dated July 28, 2020).

The most recent iteration of the successor bar is relatively new. In 2011, the *UGL-UNICCO* Board majority overruled *MV Transportation*, 337 NLRB 770 (2002), and announced that it was implementing a "modified" version of the successor bar first developed in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). However denominated, all iterations of the successor bar should be overturned, as they are inconsistent with the Act's most important principle—employee free choice—and fly in the face of Supreme Court and U.S. Courts of Appeals' precedent protecting that free choice.

A. *UGL-UNICCO* was wrongly decided.

The Board majority in *UGL-UNICCO* overstated the successor bar's past relevance and importance. Before 1981, the Board had never adopted a successor bar doctrine, and, in fact, had rejected such a doctrine in *Southern Moldings, Inc.*, 219 NLRB 119 (1975); *see UGL-UNICCO*, 357 NLRB at 803. *Southern Moldings* recognized that the successor "stands in the shoes of the predecessor vis-à-vis the [u]nion," meaning that the union is not entitled to a more secure position with the successor than it had with the original employer. 219 NLRB at 119–20. Thus, if the union had a rebuttable presumption with the previous employer, it is entitled to only that presumption with the successor. *Id.*

The first time the Board adopted any type of successor bar was in 1981 in *Landmark International Trucks*, 257 NLRB 1375 (1981), which the Sixth Circuit swiftly vacated in *Landmark International Trucks, Inc. v. NLRB*, 699 F.2d 815 (1983). At its next

opportunity, the Board adopted the Sixth Circuit's rationale against any successor bar, *see Harley-Davidson Co.*, 273 NLRB 1531 (1985), and the lack of a successor bar remained the state of the law for many years. Then, in 1999, the Board again adopted a successor bar in *St. Elizabeth Manor*, 329 NLRB 341 (1999). This was short lived, however, as the Board promptly repudiated the successor bar three (3) years later in *MV Transportation*, 337 NLRB 770 (2002).

MV Transportation recognized that "the position articulated by the Board in *Southern Moldings* represents the appropriate balance between employee freedom of choice and the maintenance of stability in bargaining relationships." *Id*. at 773. *MV Transportation* understood that the rebuttable presumption of majority status allows employees "who have firsthand knowledge of, and experience with, the union's ability, attentiveness and performance, [to] properly . . . determine whether the incumbent union is adequately representing their interests during the period of transition." *Id.* (internal quotations omitted). This rebuttable presumption provides a sufficient check against labor instability without excessively infringing upon employees' Section 7 rights. *Id.* at 775. *MV Transportation* concluded:

> [A] democracy, by its nature, undergoes the turmoil of frequent elections. But that is a price that we gratefully pay for a free society. Incumbent public officials are subject to elections at periodic intervals. Incumbent unions are not. Thus, to allow for free choice, we subject the unions to challenge at certain times when employees objectively indicate that they no longer desire representation by the union. [The successor bar] would take away that choice for an undefined period of time.

Id. at 775–76.

In short, since the NLRA's passage in 1935, the successor bar has been a part of

Board precedent and policy for barely a decade in total years. *See MV Transp.*, 337 NLRB at 770 ("For decades, with one brief and unsuccessful deviation, the Board, with court approval, balanced the competing interests involved in favor of protecting employee freedom of choice and held that employees retained their statutory right to vote following a change of employers.").

The Board majority in *UGL-UNICCO* recognized that "whether to establish a 'successor bar' presents an important policy choice, a choice which . . . calls on the Board to consider the larger, sometimes competing goals of the statute." 357 NLRB at 804. However, the Board majority's implementation of the successor bar failed to protect the NLRA's *overriding* goal: employee free choice. Indeed, the NLRA's very purpose is "voluntary unionism," *Pattern Makers'*, 473 U.S. at 107, and Section 7 "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all," *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001). Although it is the "NLRA's core principle that a majority of employees should be free to accept or reject union representation," *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983), the successor bar ignores Mr. Thomason's and his co-workers' equal right to reject representation. *See also NLRB v. B.A. Mullican Lumber & Mfg. Co.*, 535 F.3d 271, 284 (4th Cir. 2008) (noting that because the NLRA protects employee free choice, the Board "may not appropriately seek a bargaining order . . . that it knows is contrary to the will of a majority of the employees").

Here, the successor bar is thwarting the Shamrock employees' Section 7 and 9 rights to rid themselves of an unwanted representative, and it is no solace to say that their rights

are *only* being destroyed for "a reasonable time." Former Chairman Hurtgen rightly recognized that none of the arguments in the successor bar's favor "considered separately, or as a whole, warrant deprivation of employees' Section 7 rights." *Williams Energy Servs.*, 336 NLRB 160, 162 (2001) (Chairman Hurtgen, dissenting). This especially rings true here, where Mr. Thomason and the bargaining unit employees have known Local 483 for several years, thereby making their ability to discern its worth (or lack thereof) self-evident.

In addition to being a controversial doctrine within the Board, the successor bar is in conflict with federal jurisprudence that consistently (and correctly) holds a union's presumption of majority support in a successor situation is *rebuttable*, rather than conclusive. First, as noted above, the Sixth Circuit vacated the Board's creation of this bar in *Landmark International Trucks*, 699 F.2d 815. The Sixth Circuit elaborated that:

> [t]here is no reason to treat a change in ownership of the employer as the equivalent of a certification or voluntary recognition of a union following an organization drive. . . . [W]here the union has represented the employees for a year or more a change in ownership of the employer does not disturb the relationship between employees and the union. . . . A successor's duty to continue recognition under such circumstances is no different from that of any other employer after the certification year expires.

Id. at 818–19.[1]

[1] The Sixth Circuit's reasoning remains apropos today. The successor bar mischaracterizes the relationship at issue in a decertification petition. In a decertification petition, the *employees* are attempting to disassociate themselves from the *union*. It simply does not matter that the successor employer is new to the relationship. The Shamrock employees already are familiar with the Teamsters, and are well aware of the Union's positives and negatives. They can freely make an informed choice as to whether it deserves to stay. Contrary to the Board's often paternalistic view, employees are neither fools nor sheep. *Lee Lumber*, 117 F.3d at 1463–64 (Sentelle, J., concurring).

Consistent with the Sixth Circuit, the Supreme Court held in *Fall River Dyeing & Finishing Corp. v. NLRB* that if "the union has a *rebuttable presumption* of majority status, this status continues despite the change in employers." 482 U.S. 27, 41 (1987) (emphasis added). Finally, the Seventh Circuit in *Randall Division of Textron, Inc. v. NLRB* noted "[g]enerally, a successor employer, like any other employer, may withdraw its recognition of a union at any time after one year from the union's original certification." 965 F.2d 141, 148 (1992) (citations omitted).

Following these precedents, the successor bar's implementation has generated significant and repeated opposition within the Board. *See, e.g.*, *Sabreliner Aviation, LLC*, Case No. 14-RD-135815, 2015 WL 5564623, at *1 (Sept. 21, 2015) (Member Miscimarra, dissenting); *FJC Security Serv. Inc.*, 360 NLRB 929, 929 (2014) (Member Miscimarra, concurring); *UGL-UNICCO*, 357 NLRB at 813 (Member Hayes, dissenting); *St. Elizabeth Manor*, 329 NLRB at 346–50 (Members Hurtgen & Brame, dissenting).

At its core, the successor bar is designed to protect incumbent unions and exalt their interests over Mr. Thomason's and his co-workers' free choice rights. The successor bar favors the former, while the Act's principles demand the latter's protection. The Board majority's decision in *UGL-UNICCO* is based on a claim of "industrial peace," 357 NLRB at 805 (citing *Fall River*, 482 U.S. at 38), but there can be no "peace" through a policy that surrenders an entire bargaining unit's will to an unwanted union's whims, all based upon a change of name on the employees' paychecks. Indeed, in this very case, the Teamsters hastily agreed to contract proposals it had previously rebuffed, precisely to entrench itself once the decertification effort became public. (TR152:10-19; TR 156:10-157:13; 158:16-

18; Employer Exs. 7 & 8). "The Board must never forget that unions exist at the pleasure of the employees they represent. Unions *represent* employees; employees do not exist to ensure the survival or success of unions." *MGM Grand Hotel, Inc.*, 329 NLRB 464, 475 (1999) (Member Brame, dissenting). The Board's successor bar allows incumbent unions to do the very thing unions claim to fight—exploit workers and entrench themselves through a large, powerful, and sophisticated organization.

B. Employees are not children and their free choice should prevail.

Even putting to one side the Board's history of policy oscillations over controversial doctrines, the successor bar doctrine is based upon a demonstrably faulty assumption: that employees can never be trusted to make their own representational decisions during uncertain economic times. *See MV Transp.*, 337 NLRB at 773 n.12 ("Rather than relying on the employees' own judgments, the Board majority in *St. Elizabeth Manor* appeared to rely on a paternalistic assumption that the employees in a successor employer situation need the protection of an insulated period . . . to make an informed decision regarding the effectiveness of their bargaining representative."). This assumption cannot bear scrutiny, for if it were true, employees also should be denied representation elections any time the stock market tanks, their company's owner nears retirement age, when pandemic viruses spread, or when government regulatory agencies enact rules and policies that diminish the employer's profitability and make bankruptcy likely.

Employees are not children who must be protected from themselves or the free market's fluctuations and uncertainties. They should be free to make their own choices about union representation and paying money to a union they do not support, even during

times of economic uncertainty or upheaval. *Lee Lumber*, 117 F.3d at 1463–64 (Sentelle, J., concurring) ("To presume that employees are such fools and sheep that they have lost all power of free choice based on the acts of their employer, bespeaks the same sort of elitist Big Brotherism that underlies the imposition of the invalid bargaining order in this case.").

C. The successor bar is unworkable.

Besides disparaging employees' judgment and capabilities, the successor bar provides no "industrial stability" because it is impossible to know when it starts or ends. *See FJC Security Services, Inc.*, 360 NLRB at 929 (Member Miscimarra, concurring). The successor bar, as defined by *UGL-UNICCO*, is at least six (6) months and up to one (1) year from the first *bargaining session*, 357 NLRB at 809, not from the time the successor is first obligated to bargain with the union. Therefore, the successor bar prevents petitions from being filed before the bar even begins to run, as parties' first bargaining meetings often occur long after a duty to bargain attaches. *See Americold Logistics*, 362 NLRB No. 58 (involving parties who did not meet until four (4) months after the voluntary recognition occurred). Unless employees are privy to the schedule of the employer and union's bargaining sessions—which they are not—they will have no idea when the successor bar begins to run.

Even after the initial six-month bar, a Region still may dismiss the petition for *another* six-month period. During the period between six months and a year after bargaining begins, a decertification petitioner must show a reasonable time to bargain has elapsed, based on a multi-factor test derived from *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402 (2001):

> The factors we will consider in determining whether the initial 6-month insulated period should be extended are: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.

Id.[2]

Depending on what has happened in bargaining, the bar may last for only six months, a year, or somewhere in between. The reliance on a multi-factor test with shifting results necessitates that employees opposing a union file multiple petitions, month-after-month, until they are granted an election. This process is wrong and unworkable for employees, as demonstrated by *Student Transp. of Am.*, Case No. 06-RD-127208 (Decision and Direction of Election, June 5, 2014). In that case, employees in a successor situation filed *four* different decertification petitions until the Region finally granted them an election under the *Lee Lumber* factors, which the union *lost* by an overwhelming 88-13 vote. How was "industrial stability" served there?

There is nothing "stable" about requiring employees to guess and file multiple

[2] *Lee Lumber*'s application is particularly inapposite in this decertification context because those factors are used to decide whether a reasonable time has passed when dealing with an *unfair labor practice*. Putting aside that case's facts, application of its factors in the decertification context can lead to strange results. For example, one of the factors is how near the parties are to an agreement. *Lee Lumber*, 334 NLRB at 402. The Board has noted that if the parties are far away from reaching an agreement, they should be given more time to bargain and the petition should be dismissed. But, if they are close to reaching an agreement, the parties also should be given more time to bargain and the petition should be dismissed. *See MGM Grand Hotel*, 329 NLRB at 465. Thus, an employee may file a petition too early and then refile a month later and be too late. Employee rights should not be so dependent upon threading a needle, especially one over which they have no control. And here, the Regional Director found that the parties were close enough to an agreement to bar the Petition for at least several more months, even though they had never exchanged a single proposal on economic issues! See D&O at 8-9 & n. 4; TR 136:2-9.

decertification petitions, as that only serves to burden them and undermine their ability to exercise free choice. Requiring employees to collect new showings of interest and repeatedly file petitions only serves to frustrate them and heighten their cynicism about the NLRB's fairness and processes. Finally, there is nothing stable about saddling employees with a union they oppose. To the contrary, such forced representation by a minority union leads to widespread workplace *instability* and discontent. *Int'l Ladies Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961) (noting "[t]here could be no clearer abridgment of § 7 of the Act . . . " than for a union and employer to enter into a collective bargaining relationship when a majority of employees do not support union representation).

In short, the Shamrock Foods employees in Idaho have known the Teamsters for at least several years and are more than capable of weighing its value. A majority of the employees signed Mr. Thomason's showing of interest, and those employees simply want the opportunity to express their democratic right to decline representation in accordance with NLRA Sections 7 and 9.

D. The successor bar raises constitutional issues.

Serious questions exist as to the constitutionality of the successor bar, which the Board can avoid by striking down the bar in its entirety. See *Rust v. Sullivan*, 500 U.S. 173, 190–91 (1991) (discussing the doctrine of "constitutional avoidance" to uphold statutes wherever possible). Congress did not mandate a successor bar when it passed the NLRA. To the contrary, the only bar Congress enacted in the statute is the one-year election bar in NLRA Sections 9(c)(3) and 9(e)(2). By arbitrarily stripping employees of their statutory rights under NLRA Sections 7 and 9, even for a "reasonable time," the successor bar

infringes on employees' vital First Amendment free association interests without a congressional mandate to do so. The bar should be overturned.

The filing of an election petition with the Board falls within the First Amendment's protection of the right to petition the government, yet the successor bar broadly precludes access to the Board's election processes. Any individual whose employer has been acquired in the preceding six to twelve months is barred from petitioning the Board for decertification of an incumbent union. The *UGL-UNICCO* majority defended this denial of access based on concerns of employee anxiety, union vulnerability and labor stability, but the successor bar is over-inclusive in prohibiting *all* decertification petitions regardless of whether the Board's identified policy concerns are implicated.

In addition to the right to petition, the successor bar also implicates employees' First Amendment free speech and association rights. The successor bar mandates that employees continue to associate with a union for a period of time, submit to its representation, and pay dues to fund its speech on their behalf, without recourse to an election to which they are statutorily entitled. By tying employees to a union they oppose, the successor bar flies in the face of the Supreme Court's holding that compelling employees to associate and fund collective-bargaining speech violates their First Amendment rights. *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018).

CONCLUSION

The Board should grant Petitioner Curtis Thomason's Request for Review and order the Regional Director to reinstate and promptly process his Petition. It also should overrule the controversial and unworkable "successor bar" doctrine, which arbitrarily bars the

decertification of unwanted incumbent unions for unknowable periods of time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2020, a true and correct copy of the foregoing Petitioner's Request for Review was filed electronically with the NLRB Executive Secretary using the NLRB e-filing system, and copies were sent via e-mail to the following parties or representatives, as noted:

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